



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 985, 986 of 2003**

*(From Original Conviction and Sentence in Criminal Case No. 488 of 2003 of the Chief Magistrate’s Court at Thika – B. Rashid PM)*

**SAMUEL WAMATU KARANJA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 986 OF 2003**

*(From Original Conviction and Sentence in Criminal Case No. 488 of 2003 of the Chief Magistrate’s Court at Thika – B. Rashid, PM)*

**BONFACE MWANGI MUMBI ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 986 OF 2003**

*(From Original Conviction and Sentence in Criminal Case No. 488 of 2003 of the Chief Magistrate’s Court at Thika – B. Rashid, PM)*

**ANTONY KAGUA KAMBO alias KANDE ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

**SAMUEL WAMATU KARANJA, BONIFACE MWANGI MUMBI and ANTONY KAGWA KAMBO** (hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively) were jointly charged with **PETER WARUMBO WANGARI** with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars given were that on 17<sup>th</sup> day of January, 2003 at Gatundu Market in Thika District of the Central Province jointly while armed with dangerous weapons namely rungunus, they robbed Benard Kimathi Njoroge of cash 3,600/=, national identity card, one radio cassettee make JVC serial number 127V2140, one remote control and 16 discs all to the total value of Kshs.33,600/= and immediately before or immediately after the time of such robbery used actual violence to the said Benard Kimathi Njoroge. The 1<sup>st</sup> Appellant faced an alternative count of handling stolen goods Contrary to Section 322(2). Following a full trial in which the prosecution called 8 witnesses, the trial court found the Appellants guilty of the charge, convicted them accordingly and sentenced them to death as prescribed by the law. The co-accused aforesaid was however acquitted under Section 215 of the Criminal Procedure Code.

The Appellants were aggrieved by the conviction and sentence, hence each lodged an appeal. We consolidated the three appeals for ease of hearing and as they arose from the same criminal trial in the subordinate Court.

The account of the incident as given by the prosecution is that on 17.1.2003 at about 1.00 a.m., PW1 was asleep in his house when the door was forcefully broken and thugs who had torches entered. They numbered four. They ordered PW1 to keep quiet whereupon they took a radio JVC, his wallet and then left. PW1 then called his mother (PW2) and alerted her as to what had transpired. Together they proceeded to Gatundu police station and reported the matter. According to PW1 he had recognized one of the thugs by his voice. He was the 3<sup>rd</sup> appellant. He was even a neighbour. Acting on this information, the police proceeded to look for the 3<sup>rd</sup> appellant without success. The following day however, the 3<sup>rd</sup> Appellant was brought to the police station by his mother after she had heard that the police were looking for him. He was arrested and upon interrogation named his accomplices. The accomplices were all rounded up at various times and places and were all subsequently charged with the instant offence. In the course of investigations, some of the items stolen during the robbery were allegedly recovered from the 1<sup>st</sup> Appellant's residence.

Put on their defences, the Appellants all elected to give sworn statements of defence. The 1<sup>st</sup> Appellant stated that he was arrested on 21.1.2003 at 1.00 a.m. He was arrested by two police officers on the strength of a warrant of arrest issued by Gatundu court for his failure to attend court. Being a hawker, he had tiger batteries in the house. P.C. Kivuva (PW4) one of the arresting officers took the said batteries alleging that they were contraband. When the 1<sup>st</sup> Appellant demanded them back, he was threatened with being taken to Kamiti. Finally he was brought together with 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to court where for the first time he heard of the charges.

As for the 2<sup>nd</sup> Appellant, he testified that on 17.1.2003 at about 8.00 p.m. he was at Flamingo hotel when a lady confronted him with a group of Mungiki men who arrested him over a dispute he had had with the lady earlier in the day. They took him to Gatundu police station. On the 3<sup>rd</sup> day, the police demanded Kshs.10,000/= so that they could release him. However when he failed to heed the demands by the police, he was then charged with the instant offence.

The 3<sup>rd</sup> Appellant in his defence stated that on 28.1.2003, his mother (DW5) woke him up in the morning and told him that PW1 had alleged that he had stolen from him. Since they had a dispute with PW1's parents, they decided to report the matter to the police. Whilst at the police station PW1 and PW2 came and repeated the allegation. The Appellant denied the allegation and was put in the cells. Later on he was charged with the offence he knew nothing about.

In their grounds of appeal, the Appellants fault their convictions on identification, alleged recovery of the stolen items, lack of corroboration and failure by the trial court, to adequately consider their defences. All the Appellants tendered written submissions in support of their various grounds of appeal. We have

carefully perused and considered the same.

When the appeal came up for hearing before us, the state through Mrs. Gakobo, learned state counsel conceded to the same. In conceding, the learned state counsel submitted with regard to the 3<sup>rd</sup> Appellant that, his conviction was based on his identification at the scene by PW1. In his evidence PW1 had testified that he was able to identify and recognize the 3<sup>rd</sup> Appellant when he lit a torch and also by his voice. Counsel submitted that in the light of prevailing circumstances such identification, nay, recognition could not be said to have been free from possibility of error.

As for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, counsel submitted that they were not identified at the scene of crime. However they were implicated in the statement of the 3<sup>rd</sup> Appellant. This submission however cannot possibly be correct. From the record, it is only the 2<sup>nd</sup> Appellant who gave a statement under inquiry. We will assume that counsel meant the 2<sup>nd</sup> Appellant and not 3<sup>rd</sup> Appellant who gave a statement under inquiry in which he implicated the 1<sup>st</sup> Appellant. Counsel further pointed out that according to the evidence of PW4, it is the 2<sup>nd</sup> Appellant who led the police to the home of 1<sup>st</sup> Appellant where recovery of some of the stolen items was made. PW4 further testified that the recovery was made with the assistance of 1<sup>st</sup> Appellant's mother. However, according to counsel PW6 who was also present during the operation testified to the contrary. He testified that during the recovery, there was no one present at the home of the 1<sup>st</sup> Appellant. Counsel therefore submitted that the evidence of PW4 and PW6 was at variance yet critical. As regards the statement under inquiry implicating the 1<sup>st</sup> Appellant, counsel pointed out that it required corroboration which was not forthcoming. On the basis of the foregoing counsel concluded that the conviction of the appellants was not safe.

We have carefully subjected the evidence tendered in the subordinate court to fresh evaluation so as to reach our own independent conclusion as to the guilt or otherwise of the Appellants. See **OKENO vs REPUBLIC (1972) EA 32.**

The conviction of the 1<sup>st</sup> Appellant was based on the alleged recovery of stolen items from his house. The learned trial Magistrate delivered herself on this aspect of the matter in the following terms:-

**“..... The circumstantial evidence of having stolen goods in his possession only hours after they were stolen and having been implicated by 3<sup>rd</sup> accused who had been identified during the robbery, leaves no other explanation other than that he was one of the robbers.....”**

In reaching this conclusion, the learned trial Magistrate relied heavily on the evidence of PW6, P.C. Benjamin Wambua. According to PW6, during the recovery, he was accompanied by CPL Makori, P.C. Kariuki and P.C. Muthoni.

Pw1 testified on the issue as follows

**“.....3<sup>rd</sup> accused disclosed his accomplice and three officers went to the house of 2<sup>nd</sup> accused who was not present. With the assistance of his mother all stolen items were recovered from house of 2<sup>nd</sup> accused in the presence of his mother ...”**

Yet PW7 stated on the same issue as follows

**“..... on 18.1.2003 at about 11.40 a.m. I requested IP Kennedy Njoroge of CID Gatundu to record a statement under inquiry from 1<sup>st</sup> accused. 1<sup>st</sup> accused confessed and his confession led us to the recovery of stolen items. The items were in the house of his father .....**”

On the same aspect PW6 testified that

**“..... we went to his home and 1<sup>st</sup> accused showed us his home and we broke the padlock.**

**We entered and 1<sup>st</sup> accused led us and showed us where they had kept the radio. It was one room in a homestead.”**

To our mind, these contradictions in the evidence of the key witnesses as to the recovery are so major as to render their evidence incredible. If the three witnesses were all present during the recovery, there should not be such discrepancy in their evidence. The matter is further compounded by the fact that during the alleged recovery the 1<sup>st</sup> Appellant was absent. There was no evidence led to show that the house belonged to the 1<sup>st</sup> Appellant. Even if we were to accept that indeed the recovery was made in the house of the 1<sup>st</sup> Appellant, no evidence was led to show that the 1<sup>st</sup> Appellant had exclusive possession of the house. There could have been other people with access to the house. As a result of the foregoing. It was incumbent upon the court to look for corroborative evidence. Unfortunately the trial court did not discharge that task as expected. Considering that incrimination of a co-accused in a statement under inquiry without any other evidence corroborative or otherwise, provides evidence of the weakest kind against him, the trial court should have been cautious in accepting the evidence of recovery and also the incriminating evidence allegedly provided by the 2<sup>nd</sup> Appellant. The conviction of the 1<sup>st</sup> Appellant on the basis of the foregoing was not in our view safe as correctly pointed out by the learned state counsel.

As for the 2<sup>nd</sup> Appellant, in conviction him the learned trial magistrate stated

**.....As for the 1<sup>st</sup> accused person he was implicated by 3<sup>rd</sup> accused person and upon arrest led police officers to a room of 2<sup>nd</sup> accused person where the stolen items were and indeed the stolen items were recovered from the room where he said they were in his presence. Though its circumstantial evidence, it leaves no other explanation other than that the 1<sup>st</sup> accused person was one of the robbers and knew where they kept stolen goods, and the court holds so.....”**

Once again, it is important to note that the 2<sup>nd</sup> Appellant was not identified by PW1 at the scene of crime. His conviction is therefore based on the fact that he led the police to the recovery of the items which had been stolen. However as we have already stated we have our own doubts regarding the evidence of recovery in view of the contradictions we have already alluded to in this judgment. Further it should be noted that of all the witnesses who testified as to the recovery, apart from PW6, none of them ever mentioned that the 2<sup>nd</sup> Appellant led them to the house where the recovery was made. PW1 stated in cross examination by 2<sup>nd</sup> Appellant:-

“..... Nothing was recovered from you but you said from where they had to be recovered. I was not there during the recovery but I was told.....”

According to this witness, the 2<sup>nd</sup> Appellant merely mentioned the place where the stolen items would be found. On the same issue PW4 testified thus

**.....3<sup>rd</sup> accused disclosed his accomplice and three officers went to the house of 2<sup>nd</sup> accused who was not present. With the assistance of his mother all stolen items were recovered from house of 2<sup>nd</sup> accused in the presence of his mother.....”**

Once again it is clear that PW4 did not mention that the 2<sup>nd</sup> Appellant led the police officers to the recovery of the exhibits nor did he say that the 2<sup>nd</sup> Appellant was one of the accomplices. P.C. Wambua on his part testified on the same footing that

**“later on 1<sup>st</sup> accused was arrested by another officer and brought to police station. 1<sup>st</sup> accused volunteered and led us to the place where the stolen items were. .... it was during the day time at 12 noon on 18.1.2003 .....”**

However according to PW7, at that very time the 2<sup>nd</sup> Appellant was allegedly recording a statement under inquiry before Inspector Njoroge (PW8). Who is not telling the truth here? It cannot be the 2<sup>nd</sup>

Appellant. Considering the sworn defence advanced by the Appellant, we think that in the light of the inconsistencies that we have endeavoured to point out, the prosecution evidence against the 2<sup>nd</sup> Appellant cannot be sustained.

As for the 3<sup>rd</sup> Appellant, his conviction is based on his alleged identification and recognition at the scene of crime by P.W.1

“..... At about 1.00 a.m., 4 people came to my house where I slept. I was alone. They had broken a door and I was shocked as they entered. I knew one of them from his voice and when they lit a torch. I saw him. He is Kagwa my near neighbour whom I knew. They told me to keep quiet and took a radio JVC and wallet and they left .....

From this evidence it is not clear how P.W.1 would have been able to recognize the 3<sup>rd</sup> Appellant by his voice. There is no evidence that the 3<sup>rd</sup> appellant or indeed any of the robbers spoke to P.W.1. If the 3<sup>rd</sup> Appellant had spoken to P.W.1, what could have been much easier than to repeat the exact words spoken that enabled P.W.1 to recognize the 3<sup>rd</sup> Appellant’s voice. In our view it was absolutely necessary for the prosecution to extract from P.W.1 by way of evidence, the exact words spoken by the 3<sup>rd</sup> Appellant to eliminate any lingering doubts as to the alleged voice recognition of the Appellant. In the case of **SIMON MBELLE vs REPUBLIC (1982 – 88) 1 KAR 518**. the Court of Appeal stated

“..... In relation to identification by voice care would obviously be necessary to ensure, that it was the accused’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it....”

These inquiries were not made by the trial court. They were absolutely necessary, so as to eliminate possibility of mistaken identity. In our view and in the absence of the inquiries aforesaid, the trial court should not have relied on the fact of voice recognition to convict the Appellant.

P.W.1 further stated that he was able to identify the 3<sup>rd</sup> Appellant by the light of the torch. It is not clear whether all the robbers had torch lights, and if so whether they directed the beam of the torch to the face of the 3<sup>rd</sup> Appellant as would have enabled P.W.1 to identify him. All that P.W.1 said on this aspect of the matter is that

“..... I knew one of them from his voice and when they lit a torch I saw him.”.

Even if we were to accept that indeed P.W.1 was able to identify the 3<sup>rd</sup> Appellant, we would still fault that evidence of identification on the basis that the court did not similarly make inquiries as to the intensity of the torch light, its source in relation to the thugs, the size of the room, the amount of time that P.W.1 kept the Appellant under observation etc. See **REPUBLIC TURNBULL (1976) 3 ALL E.R. 549**. In our view the obtaining circumstances during the commission of the offences did not favour positive identification and or recognition of the appellant by P.W.1.

We think that we have said enough to show that we are in agreement with the learned state counsel that the conviction of the Appellants was not safe.

In the result we allow the appeal, quash the conviction and set aside the sentence of death imposed on each one of them. The Appellants should be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 16<sup>th</sup> day of May, 2006.

.....

**LESIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**